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Supreme Court, U.S.
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No. 01-853

In the

Supreme Court of the United States

DARWIN R. GRIFFITH,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ of Certiorari To The Superior Court Of New Jersey, Appellate Division

Brief of the Respondent In Opposition to the Petition for Certiorari

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QUESTIONS PRESENTED

Where petitioner's property contained both uplands and wetlands and where petitioner did not complete his application to develop the uplands, but brought an inverse condemnation action after the State had issued a wetlands permit for an access road to the uplands, and before a waiver provision applicable to development of the property had been applied, and before the New Jersey Appellate Division had completed its review of petitioner's challenge to the wetlands permit as unreasonable:

1. Did the New Jersey Appellate Division properly reject petitioner's claim of a compensable temporary taking under the Fifth Amendment, after determining that the State had engaged in a reasonable administrative process and that development delays were caused by the owner's decision to pursue the inverse condemnation action prematurely and to forego the application process?

2. Is a landowner who files an inverse condemnation action before completing available administrative remedies and who subsequently obtains all requested development approvals as the result of the completion of a reasonable administrative process entitled to compensation?

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STATEMENT OF THE CASE

This petition seeks review of the New Jersey Appellate Division's decision that the State did not temporarily take the property of petitioner Darwin R. Griffith without just compensation. Petitioner's property contains 40 acres of uplands and 23 acres of freshwater wetlands, and has road frontage consisting entirely of wetlands. When the property was carved out of a much larger parcel by partition, permits were required to disturb the wetlands and to develop the uplands with more than 24 residences. Petitioner applied for a permit to construct a road through the wetlands to the uplands in July 1988, but did not submit development plans for the uplands until November 1993.

The State issued wetlands permits as well as approvals for upland development pursuant to an administrative process which the Appellate Division found was reasonable and did not entail any extraordinary delay attributable to the State. In addition, the Appellate Division determined that petitioner had brought his inverse condemnation action prematurely before applying to develop the uplands, and that delays were caused by petitioner's decision to pursue the lawsuit and forego the application process.

Despite these circumstances, petitioner argued that the State had effected a temporary taking of his property from June 1992, when the State issued a wetlands permit for an access road to the uplands, until the date the administrative process for development of the uplands was concluded. The Appellate Division rejected these assertions and the New Jersey Supreme Court denied certification and dismissed petitioner's appeal.

A. STATEMENT OF FACTS

In 1984, petitioner Darwin R. Griffith acquired a 63-acre site and other properties as the result of a partition action. As created by the partition from a much larger parcel, the site contained both uplands and wetlands and had road frontage on

Nugentown Road consisting entirely of freshwater wetlands. In addition, permits were required to disturb the site's wetlands and to develop its uplands with more than 24 units. In the partition, Griffith also obtained an access easement to the 63-acre site from Bridge Road, another public road (Pet. App.2 - Pet. App.3; Pet. App.5; Pet. App.23; Pet. App.39).

Griffith sold two of the other properties acquired in the partition for nearly one million dollars, and then applied to respondent State of New Jersey, Department of Environmental Protection ("NJDEP") for a freshwater wetlands permit, seeking a road through the wetlands of the 63-acre site to its uplands. The application did not contain any development plans for the uplands (Pet. App.2 - Pet. App.4).

In 1989, NJDEP denied the wetlands permit, based in large part on its view that the access easement from Bridge Road could provide viable alternative access to the uplands (Pet. App.140 - Pet. App.141). Following administrative proceedings, however, in June 1992 NJDEP issued a wetlands permit for a road through the wetlands next to Nugentown Road to the uplands. The permit limited the road's width to 16 feet to minimize environmental impacts, but provided that an application to modify the permit and widen the road could be filed upon approval of development in the uplands (Pet. App.4).

In November 1993 and January 1994, Griffith applied to NJDEP for a 44-lot residential subdivision in the uplands and to amend the County Water Quality Management Plan to include the proposed subdivision in a sewer service area. After Griffith refused to supply information required to complete the subdivision application, NJDEP canceled the application in December 1994 and denied the sewer service request in early 1995 (Pet. App.5 - Pet. App.6). NJDEP also modified the wetlands permit in May 1994 to allow an application for a wider road to be filed at any time, and advised Griffith that it could not approve his wetland

mitigation plan (Pet. App.4; Pet. App.6 - Pet. App.7; Pet. App.215 - Pet. App.220).

B. PROCEEDINGS BELOW

Griffith challenged the wetlands permit decision of 1994, the cancellation of his application for upland development, the denial of his request related to sewer service and the action on his wetlands mitigation plan in the Appellate Division (Pet. App.4; Pet. App.6). In June 1995, while these appeals were pending, he filed an inverse condemnation action in the Law Division, alleging that NJDEP's actions since 1989 had caused a regulatory taking (Pet. App.8).

In May 1996, the Appellate Division held that NJDEP had reasonably canceled Griffith's application for a 44-lot subdivision of the uplands, and that there were available administrative remedies that had not been pursued related to sewer service and the wetland mitigation plan (Pet. App.37 - Pet. App.68). The Appellate Division also held that NJDEP's wetlands decision of 1994 was unreasonable, reasoning that once Griffith had applied to the agency to develop the uplands in 1993, it should not have continued to require him to apply for a permit modification for a wider road (Pet. App.22 - Pet. App.36).

In the fall of 1996, NJDEP issued a new, modified wetlands permit to Griffith in compliance with the Appellate Division's decision, invited him to again apply to develop the uplands, and advised him that the uplands could be developed at a "moderate" intensity (Pet. App.8; Pet. App.221 - Pet. App.222). However, Griffith decided to pursue his inverse condemnation action and to forego the application process. In 1998, the trial court found a permanent taking of the site as of June 25, 1992, the date NJDEP issued a permit for a 16-foot wide road through the wetlands, although NJDEP had issued a modified wetlands permit in 1996 and petitioner had never completed his application to develop the uplands after being

invited to do so (Pet. App.8 - Pet. App.9). In 1999, the Appellate Division reversed the trial court's takings decision, because the lower court had entered its takings judgment before allowing NJDEP to implement a statutory provision within the State's Freshwater Wetlands Protection Act, which permits the agency to relax a regulatory standard to avoid a taking of property without compensation (Pet. App.105 - Pet. App.114).

On remand to the trial court, NJDEP approved petitioner's application for a 43-lot subdivision on sewers and waived its wetlands mitigation fee requirement and other fees (Pet. App.2). In 2000, the trial court awarded compensation of $264,000 to Griffith for a temporary taking from June 1992 to September 1999, as well as attorneys' fees (Pet. App.115 - Pet. App.136). In 2001, on appeal by NJDEP, the Appellate Division reversed that decision (Pet. App.1 - Pet. App.21).

The Appellate Division found that the inverse condemnation action had been filed prematurely in 1995 before the completion of the administrative process, which included the application to develop the uplands, the waiver process provided by the State's Freshwater Wetlands Protection Act, and judicial review of the wetlands permit. The Appellate Division also determined that NJDEP had conducted a reasonable administrative process which had not entailed any extraordinary delay, and that petitioner's decision to forego NJDEP's invitation to submit applications to develop the uplands had deprived him of the use of the property, not NJDEP (Pet. App.1 - Pet. App.21). The New Jersey Supreme Court denied certification and dismissed Griffith's appeal in September 2001 (Pet. App.137).

REASONS FOR DENYING THE WRIT

This Petition does any present any issue requiring resolution by this Court, but simply involves the application

of settled law to the facts and petitioner's complaint that the court below misapplied precedent. This Court previously has held that a requirement to obtain a permit does not cause a regulatory taking, and also has held that fluctuations in property value caused by the governmental decision-making process are attributes of ownership, not regulatory takings, in the absence of extraordinary delay. In addition, this Court has determined that a regulatory takings claim is not ripe until the responsible agency has made a final determination of what development will be allowed under the regulatory scheme, which includes the opportunity to grant any applicable waiver or variance.

The Appellate Division applied these existing standards to the record, and decided that NJDEP had engaged in a reasonable administrative process that did not involve any extraordinary delay attributable to the agency. In addition, based on its review of the record, the Appellate Division found that petitioner had filed his inverse condemnation action prematurely before completing the available application process, and that this strategic decision deprived him of the use of the property, not the government. The Appellate Division reached these conclusions after applying the standards set by this Court to the record. Further review by this Court would involve this Court in a new review of the record that is completely unnecessary.

In addition, the Appellate Division's decision was based in part on its interpretation of a section of the State's Freshwater Wetlands Protection Act that allows NJDEP to avoid a regulatory taking by relaxing regulatory standards and approving development. The Court should not revisit this issue of State law decided by the State's intermediate court.

This case is a fact-sensitive matter in which the Appellate Division properly determined that an administrative process that led to the approval of a 43-lot subdivision on sewers and included the granting of three wetlands approvals was

reasonable and did not entitle petitioner to compensation for a temporary taking. To reach its conclusion, the Appellate Division correctly rejected petitioner's contention that the State had engaged in extraordinary delay, and properly decided that petitioner was deprived of use of the property because he decided to prematurely seek compensation through an inverse condemnation action, and to forego the application process to develop the uplands.

This Court has squarely held that a requirement to apply for a permit does not cause a regulatory taking, and also has recognized that fluctuations in value during the governmental decision-making process do not cause a taking, unless there is extraordinary delay attributable to the government. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985); Danforth v. United States, 308 U.S. 271, 285 (1939); Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320-21 (1987). In addition, this Court has repeatedly held that a regulatory takings claim is not ripe until the responsible agency has finally determined what development will be allowed under the applicable regulatory scheme, which includes any pertinent opportunity to grant a waiver or a variance. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 186 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 351 (1986); Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 297 (1981); Palazzolo v. Rhode Island. 533 U.S. 606, ___, 121 S. Ct. 2448, 2459, 150 L. Ed. 2d 592, 609 (2001).

The Appellate Division applied these standards, which both parties to the case agree upon, to reach its conclusion that there had not been a temporary taking of petitioner's property (Pet. 15). Granting the Petition for Certiorari would engage this Court in the resolution of a factual dispute and in the review of a record previously examined by the State

Appellate Division. Thus, the Petition for Certiorari should be denied.

The New Jersey Appellate Division's application of these settled standards to the facts was eminently reasonable. First, as the court noted, it was not until the administrative appeal of the June 1992 wetlands permit was well underway that an application to develop the uplands was finally filed. Petitioner could not have been deprived of the viable economic use of his land by reason of the wetlands permit alone, since economic use of the property could not have been realistically made without an application to develop the uplands.

Second, the Appellate Division correctly concluded that the State engaged in a reasonable administrative process when it reviewed the application for a road through the wetlands to the uplands. The State initially denied a permit for the road, because it believed that the access easement secured through the partition action constituted a viable alternative. However, as a result of the administrative appeals process, the State permitted the construction of a road through the wetlands in 1992, and modified that permit in 1994. In 1996, following appellate review of the wetlands permit, the State issued another modified wetlands permit to Griffith.

A permit for upland development was essential to the use of the property, but Griffith delayed applying for that permit and then refused to complete the application. The Appellate Division upheld as reasonable NJDEP's processing of this key application. Petitioner's suggestion that the State's permitting actions were unreasonable is unfounded, in light of these facts. In addition, addressing petitioner's complaint that the judicial appeals process should not have been deemed a part of the administrative process, and constituted an unreasonable delay, would not affect the disposition of this matter. Petitioner appealed the cancellation of his application to develop the uplands, but that appeal was rejected.

Afterwards, Griffith chose to pursue his inverse condemnation action and to forego the application process to develop the uplands. As the Appellate Division determined, it was this conduct which deprived petitioner of the use of the property, not the State. [1]

Another ground on which the Appellate Division relied was a provision of the State's Freshwater Wetlands Protection Act, N.J. Stat. Ann. 13:9B-22(b), which the court recognized as a part of the administrative process that must be used to determine what development is permissible (Pet. App. 13). This Court has expressly held that a takings claim is not ripe if it is filed before the responsible agency finally determines the extent of permitted development on the land, and has had the opportunity to grant any applicable waiver or variance. In addition, a State is entitled to establish procedures for the consideration of development applications and subsequent takings claims. Palazzolo v. Rhode Island, 533 U.S. 606, _, 121 S. Ct. 2448, 2459-62, 150 L. Ed. 2d 592, 609-612 (2001). It would not be appropriate for this Court to review the Appellate Division's interpretation of N.J.Stat. Ann. 13:9B-22(b), which is a part of the procedures established by New Jersey to consider development applications and subsequent takings claims.

The Petition for Certiorari should be denied, and not held pending review of Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, No. 00-1167. That case involves a temporary moratorium which precluded development, but this Petition does not. Rather, it involves a permitting process which the State's appellate court

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[1] A further reason that no taking occurred is that the 63-acre site was not the entire parcel, as the site was carved out of a much larger property by partition. All of the properties awarded to petitioner in the partition, including two sites previously sold for nearly one million dollars, constituted the parcel as a whole. The Appellate Division did not reach this issue, which the State raised below.

determined was conducted in a reasonable fashion, based on its review of the record and correct application of precedent.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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